

**United States Department of Labor
Employees' Compensation Appeals Board**

R.Z., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE, Miami,
FL, Employer**

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**Docket No. 08-465
Issued: July 21, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 5, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 4, 2007, regarding an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the overpayment of this case.¹

ISSUES

The issues are: (1) whether the Office properly determined that appellant received an overpayment for the period July 28 to August 26, 2006 in the amount of \$2,383.07; and (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment and, therefore, ineligible for waiver of the overpayment.

¹ The record also contains two decisions dated March 19 and May 21, 2007 denying compensation for certain claimed periods. Appellant has not appealed these decisions.

FACTUAL HISTORY

On May 31, 2005 appellant, then a 46-year-old mail processor, filed an occupational disease claim alleging that repetitive lifting caused an injury to his lower back and left side in the performance of duty. He realized that his condition was caused or aggravated by his employment on May 17, 2005. Appellant did not initially stop work. The Office accepted his claim for a sprain/strain of the lumbar region and paid appropriate compensation.

On August 1, 2006 appellant filed a Form CA-7 for leave without pay for the period July 20 to August 8, 2006. In a separate statement also dated August 1, 2006, he requested wage-loss reimbursement for the period July 27 to August 8, 2006. Appellant alleged that he was removed from the workroom floor because he was not meeting the employing establishment's work expectations while he was taking muscle relaxants due to pain.

On August 14, 2006 the Office advised appellant that the CA-7 forms were being returned as he had not submitted his requests via the employing establishment. Appellant was advised that all requests for compensation must be submitted through the employing establishment before any action could be taken. He was further advised that a physician's opinion must support the disability period.

In an August 23, 2006 letter, appellant advised that the employing establishment still had not provided him light duty within his restrictions. On October 23, 2006 the employing establishment forwarded to the Office a leave time analysis form, CA-7a, indicating that appellant was absent without leave for 104 hours from August 9 to 26, 2006. On September 14, 2006 appellant requested that the Office reimburse him for lost wages for various periods including July 28 to August 26, 2006. He also noted that he was providing a letter noting dates for which he had been paid, dates that had been certified for payment and dates that were pending certification. After development of the record, the Office determined that appellant was entitled to payment for the period July 28 to August 26, 2006. In a memorandum of telephone call dated December 4, 2006, the Office informed appellant that he would be receiving a check for this period as "his medical condition did support him out of work due to medications."

The record reflects that, on December 5, 2006, the Office authorized payment of wage-loss compensation to appellant in the amount of \$2,383.07 covering the period July 28 to August 26, 2006.

In a telephone call memorandum dated December 21, 2006, appellant notified the Office that he had not received his payment which was sent by the Office on December 8, 2006. The Office requested a statement from appellant in writing and informed him that a tracer would be issued. It subsequently received several facsimiles, from appellant, confirming that he had not received the check covering the period July 26 to August 26, 2006.

In a telephone call memorandum dated December 29, 2006, appellant again contacted the Office to inquire as to when his check would be reissued. The Office received another inquiry from him on January 4, 2007. In a separate statement, also received on January 4, 2007, appellant alleged that he had been assessed penalties and late fees as a result of the delay in his check, in the amount of \$3,625.42. He requested reimbursement for these fees and penalties. In

a January 8, 2007 letter, the Office advised appellant that there were no provisions for reimbursement of late fees. In a January 8, 2007 telephone conversation memorandum, it informed him that his reissued check was ready for certification.

On January 9, 2007 the Office authorized that a duplicate check, in the amount of \$2,383.07, be issued to appellant covering the period July 28 to August 26, 2006. The check was dated January 12, 2007.

The Office subsequently received a copy of the check issued on December 8, 2006, and determined that appellant negotiated and signed that check on January 5, 2007. This check paid wage-loss compensation for the period July 28 to August 26, 2006. Additionally, the Office received a copy of the duplicate check issued on January 12, 2007, which appellant negotiated and cashed on January 18, 2007. This check also contained information that the wage-loss compensation was for the period July 28 to August 26, 2006.

In an April 3, 2007 memorandum, an Office fiscal operations specialist indicated that the Office had been notified by the Treasury Department that payment over cancellation had occurred and was negotiated for the period July 28 through August 26, 2006. She noted that there was an overpayment.

On June 22, 2007 the Office made a preliminary finding that an overpayment of compensation had occurred in the amount of \$2,383.07. It found that appellant had received two compensation checks for the same period July 28 to August 26, 2006. The Office found that he was with fault in the creation of the overpayment because he negotiated and cashed both the original payment and the reissued payment for the same period of time. Appellant was informed of his right to challenge the amount of the overpayment or request a waiver of the overpayment. If he wished a waiver of the overpayment, he was directed to submit financial information by completing an overpayment recovery questionnaire. In a June 22, 2007 memorandum, the Office found that appellant was at fault in creating the overpayment because he knew or should have known that he was not entitled to receive two separate checks for the same amount of money for the same period of time. It found that appellant proceeded to cash both the December 8, 2006 check and the duplicate check dated January 12, 2007, even though they were clearly issued for the same period of time and amount.

On July 13, 2007 the Office received a response from appellant contesting the overpayment. Appellant noted that he had submitted numerous other dates along with numerous hours for medical attention and pain discomfort. He contended that he believed that the check was payment for his other reimbursement requests. A partially completed overpayment recovery questionnaire accompanied his response. Appellant did not list his income; however, he listed his monthly mortgage as (\$3,500.00), food (\$500.00), clothing (\$200.00), and utilities (\$300.00). In response to question eight on the form, he alleged that he had submitted numerous dates and hours for times that he received medical attention and that he was out of work due to his work-related accident, prior to the dates in the letter. Appellant alleged that he was led to believe that he was going to be reimbursed for the times that he was already owed. He also responded to question 11, in regard to whether he now fully understood his responsibilities, and alleged that he “was not aware that there was anything wrong to report.”

In a decision dated September 4, 2007, the Office finalized the overpayment. It found that appellant was with fault because he negotiated and cashed both the original payment and the reissued payment, which both clearly indicated that they were paid for lost wages from July 28 to August 26, 2006. The Office considered appellant's argument that he believed that he was being reimbursed for other hours of lost time due to his work injury. However, it determined that two separate decisions were issued denying his claims for the periods of compensation for lost time in January, February, March and September 2006.² The Office found that appellant accepted a payment which he knew or should have known to be incorrect. It also noted that appellant was not currently in receipt of wage-loss compensation; however, based on his prior wage information, he should pay \$200.00 each month until the overpayment was repaid.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.³ When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁴

Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁵ When a claimant receives a duplicative compensation payment for a period that he has already received compensation for wage loss, an overpayment of compensation is created.⁶

ANALYSIS -- ISSUE 1

The record establishes that a compensation check covering the period July 28 to August 26, 2006 was issued and sent to appellant on December 8, 2006 in the amount of \$2,383.07. After being informed by appellant that he had not received this check, the Office issued a duplicate payment in the amount of \$2,383.07 for the period July 28 to August 26, 2006 on January 12, 2007. The record reflects that appellant subsequently negotiated and cashed both checks for the same period. As appellant was not entitled to duplicate compensation for the same period, an overpayment of compensation of \$2,383.07 was created.

² *See id.*

³ 5 U.S.C. § 8102(a).

⁴ *Id.* at § 8129(a).

⁵ 5 U.S.C. § 8116(a).

⁶ *See Lawrence J. Dubuque*, 55 ECAB 667, 670-71 (2004).

The receipt of these two compensation payments for the same amount covering the same time frame, caused an overpayment of compensation to appellant. The Board will affirm the Office's September 4, 2007 decision on the issue of fact and amount of the overpayment.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to, or the amount of, benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment: (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect (this provision applies only to the overpaid individual).⁷

Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.⁸

ANALYSIS -- ISSUE 2

The Office applied the third standard in determining that appellant was at fault in creating the overpayment. In order for the Office to establish that appellant was at fault in creating the overpayment, it must show that, at the time he received and accepted the compensation checks in question, he knew or should have known that the payment was incorrect.⁹

The record establishes that, on December 8, 2006, the Office issued to appellant a check for wage-loss compensation in the amount of \$2,383.07 covering the period July 28 to August 26, 2006. On December 21, 2006 appellant advised the Office that he had not received his payment. The Office requested that he provide a written statement to confirm that he had not received the check, which covered the period July 28 to August 26, 2006. It subsequently received a statement from appellant, on that same date, confirming that he had not received the check. Appellant contacted the Office again on December 29, 2006 and via letter on January 4, 2007, regarding the status of his check. The record reflects that the Office issued a duplicate check on January 9, 2007. Thereafter, on January 5, 2007 appellant negotiated and cashed the original check, which was issued on December 8, 2006. This check contained a notation that the compensation period was from July 28 to August 26, 2006 and was in the amount of \$2,387.07. The record reflects that, on January 18, 2007, less than two weeks later, appellant negotiated and

⁷ 20 C.F.R. § 10.433(a).

⁸ 20 C.F.R. § 10.433(b).

⁹ *Robin O. Porter*, 40 ECAB 421 (1989).

cashed the duplicate check, in the same amount of \$2,387.07 and which also contained a notation that it covered compensation for the period July 28 to August 26, 2006. This is important since appellant had just accepted the earlier check for the same amount covering the same time period and both checks clearly listed the compensation period on the face of the check.¹⁰ The Board finds that the evidence establishes that appellant was at fault in the creation of the overpayment because, at the time he received and accepted the duplicate compensation check, he knew or should have known that the payment was incorrect.

Although appellant stated his belief that the duplicate check, issued January 12, 2007, covered dates for his other reimbursement requests, this argument lacks merit. As noted, this check listed the covered period July 28 to August 26, 2006, which was the same as the period listed on the December 8, 2006 check. It was not reasonable for appellant to believe that the payment covered a period different than that listed on the face of the check. Additionally, the record indicates that appellant was knowledgeable regarding his claims and was in close contact with the Office regarding the status of his check for the period July 28 to August 26, 2006. This evidence shows that, on January 8, 2007, the Office advised him that his reissued check was in the process of being issued. There is no evidence contemporaneous with the issuance of this check to indicate that the Office had approved payments for any other period. Consequently, appellant's argument that he was led to believe that he was going to be reimbursed for other claimed times is not persuasive.

The evidence establishes that he accepted a payment which he knew or should have known to be incorrect, and he is at fault under 10.433(a)(3). Since appellant was at fault in the creation of the overpayment, waiver of recovery of the overpayment in the amount of \$2,383.07 may not be waived. The Board notes that it does not have jurisdiction to consider recovery of these overpayments as the Office is not seeking recovery from continuing compensation under the Act.¹¹

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment in the amount of \$2,387.07. The Board also finds that the Office properly determined that appellant was at fault in the creation of the overpayment and therefore, ineligible for waiver of the overpayment.

¹⁰ See *id.* at 425-26 (where the Board noted that copies of compensation checks with specific periods covered by the check would be evidence that the claimant was apprised by the Office, as of the time she accepted the compensation checks, of the specific periods the checks covered so as to put her on notice regarding an incorrect payment under the third fault standard).

¹¹ *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board